Saskatchewan Human Rights Commission

SUBMISSION

to the

Special Education Review Committee

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Saskatchewan Human Rights Commission Submission to the Special Education Review Committee

1. Introduction

The inquiry of the Special Education Review Committee into services for students with exceptional needs is a far-reaching and important task. As noted by Mr. Justice La Forest of the Supreme Court of Canada,

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization.... Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed. [1]

The Saskatchewan Human Rights Commission has an interest in the Committee's review because of provisions in *The Saskatchewan Human Rights Code* guaranteeing students with disabilities the right to equal access to and benefit from the educational system. As the agency responsible for enforcing the *Code*, the Commission is engaged on an ongoing basis with the interpretation of human rights law. As the front-line agency dealing with discrimination complaints, the Commission is also in a unique position to identify situations, policies or practices that could constitute possible violations of the *Code*. At the same time, the Commission is strongly committed to proactive measures that can achieve the equality goals of students with disabilities in a positive, cooperative manner.

This submission will discuss both the human rights obligations of educators towards students with disabilities, and the role of the Human Rights Commission in promoting equity for such students.

2. Human Rights Protections for Students with Disabilities

Under the *Code*, educators have an obligation to provide educational services in a non-discriminatory manner.

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1 *Eldridge v. A.G. of B.C. and The Medical Services Commission*, Supreme Court of Canada, October 1997, para. 56.

The philosophical foundations of the *Code* are set out in section 3, which states the objectives of the Act are:

> (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
> (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

Section 13 (1) sets out the basic right of students to education without discrimination because of disability.

> 13(1) Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of his or their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, nationality, ancestry, place of origin or receipt of public assistance.

Section 13(2) enables educators to develop special programs for students with special needs by permitting educational institutions to limit enrolment on the basis of disability. It does not prevent individual students from claiming their placement in a special education class is discriminatory, but it does protect educational institutions from complaints of discrimination simply because they have created such programs.

> 13(2) Nothing in subsection (1) prevents a school, college, university or other institution or place of learning from following a restrictive policy with respect to enrolment on the basis of sex, creed, religion or disability, where it enrols persons of a particular sex, creed or religion exclusively, or is conducted by a religious order or society, or where it enrols persons who are disabled.

"Disability" is defined in section 2(d.1) as including both physical and mental disabilities. (See Appendix "A.") Discrimination complaints to human rights agencies have involved many disabilities, including deafness, visual impairment, wheelchair reliance, learning disabilities, and Down's Syndrome.

3. Legal Principles

All aspects of human rights law apply to the education of students with disabilities, but several legal principles are especially relevant. In summarizing them, this submission will make frequent reference to *Eldridge v. A.G. of B.C. and The Medical Services Commission*, the most recent decision of the Supreme Court of Canada involving the rights of persons with disabilities.

(A) Adverse Impact Discrimination

Discrimination may be either direct (intentional) or indirect (unintentional). Unintentional discrimination is sometimes referred to as "adverse impact, "adverse effects" or "systemic" discrimination. This kind of discrimination can result from policies and practices that appear neutral on their face but have an adverse effect on certain groups because of personal characteristics such as religion, gender or disability.

An example of direct discrimination could be the decision of a school division to group visually impaired students in facilities that are inferior to those used by non-disabled students. An example of indirect discrimination could be the requirement that all students write an examination within the same time period and under the same circumstances. This requirement might not be deliberately discriminatory but it could have an adverse impact upon people with attention deficit disorders, for example, who might require accommodation in the form of additional time or a quiet location in which to write an examination.

(B) Duty of Reasonable Accommodation

Where adverse impact discrimination occurs, the educator (or employer or public service provider, as the case may be) has a legal duty to make reasonable efforts to accommodate those who have been adversely affected by the seemingly neutral rule or practice. The duty of reasonable accommodation only extends up to the point of undue hardship. What is considered undue hardship will depend upon the circumstances of each case, and may include such factors as cost and the effects of accommodation upon other students.

(C) Equality of Benefit vs. Identical Treatment

The concept of equality of benefit is linked to that of reasonable accommodation.

Many cases under human rights legislation and section 15(1) of the *Canadian Charter of Rights and Freedoms* point out that identical treatment frequently produces inequality for those who are disadvantaged by disability, gender, or other personal characteristics enumerated in the legislation. A lecturer who relies on oral presentations may treat all students the same way, for example, but deaf students will receive limited benefit from the presentations.

La Forest J. noted in *Eldridge* that discrimination against persons with disabilities often results from "a failure to ensure that they benefit equally from a service offered to

everyone."2 He quoted McIntyre J. in *Andrews v. Law Society of British Columbia*, who commented, "It must be recognized...that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality." 3

4. Two Methods of Promoting Equality

The Saskatchewan Human Rights Code authorizes the Commission to promote the equal dignity and rights of students with disabilities through both equity programs and the complaint system. Discrimination complaints can be filed under section 13 of the *Code* (quoted above). Section 47 enables the Commission to approve and monitor special programs designed to prevent, eliminate or reduce disadvantages experienced by groups of individuals because of a prohibited ground of discrimination. To date, the Commission has approved employment and education equity plans for four groups: women, Aboriginal peoples, people with disabilities, and members of visible minorities.

In 1985, the Commission launched an education equity program for Aboriginal students in the K-12 system in response to research showing that as many as 90 percent of Aboriginal students left school before completing grade 12. Eighteen school divisions now participate in this voluntary program. At the post-secondary level, approved education equity plans cover all four designated groups. The Commission sees a need to expand the focus of K-12 plans in a similar manner.

The Commission strongly believes that proactive initiatives like equity plans are, in the long term, the best hope for creating equitable, welcoming school environments for students with disabilities. Proactive measures can achieve broad-scale change in a positive, cooperative manner while individual complaints cannot.

Nevertheless, the complaint system acts as a necessary complement to voluntary equity measures. It not only provides access to remedies in individual cases but also—through the development of case law—provides insights into the meaning of equality and the obligations of educators or other service providers.

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2 *Ibid.*, para. 66.

3 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164.

5. Equity in Education Forum

In November 1997, the Minister of Education announced a broad initiative by all major partners in the education community when she released a policy document developed by the Equity in Education Forum and entitled *Our Children, Our Communities and Our Future*. This policy articulates a common vision for promoting equity in schools and covers all students, including students with disabilities.

Forum members include the Department of Education; Saskatchewan School Trustees Association; Saskatchewan Teachers' Federation; League of Education Administrators, Directors and Superintendents; Gabriel Dumont Institute; University of Saskatchewan; University of Regina; and the Saskatchewan Human Rights Commission.

The Forum is now working on strategies for implementing the policy framework. However, it will need strong support from Saskatchewan Education and all sectors of the education community to be successful.

6. Students with Disabilities: Human Rights Complaints and Case Law

It is important for all educators, including individual teachers, to be aware of the equality rights of students with disabilities. Over the past ten years, the Human Rights Commission has received 30 complaints of discrimination in education on the basis of physical disability and 15 based on mental disability. The issues raised by the complaints include harassment, the duty of reasonable accommodation, and integration.

The law regarding students with disabilities is still evolving, partly because the majority of human rights decisions to date have involved discrimination in employment. However, two recent decisions from the Supreme Court of Canada offer some guidance regarding what will be considered discriminatory in the educational context: *Eaton v. Brant County Board of Education* (February 6, 1997); and *Eldridge v. A. G. of B.C. and The Medical Services Commission* (October 9, 1997). Both cases arose under section 15(1) of the *Charter*, but they can also be applied to the equality guarantees of human rights statutes. These cases will be discussed further below.

(A) Harassment

Harassment of students because of disability is a form of discrimination and is therefore illegal under *The Saskatchewan Human Rights Code*. Teachers and others acting on behalf of educational institutions have a duty to intervene and to prevent such harassing behaviour.

The extent to which educators will be considered responsible for the harassing behaviour of students and others has not yet been clarified by the case law. In the employment context, however, employers are held to a high standard of accountability for sexual, racial, and other discriminatory forms of harassment. Even if they are unaware that harassment is occurring in the workplace, employers are considered liable for the harassing behaviour of managers, supervisors and co-workers. Employers are also considered responsible for the harassing behaviour of customers.

(B) Adverse Impact Discrimination & The Duty of Reasonable Accommodation

In the educational context, discrimination against persons with disabilities often results from the unintended effects of standard rules or practices that either exclude people with disabilities or deny them a benefit available to others. Physical inaccessibility can also result in adverse impact discrimination. A school that can only be reached by a flight of stairs, for example, will be inaccessible to students in wheelchairs. Where adverse impact discrimination occurs, educational institutions have an obligation to take reasonable steps to accommodate students with disabilities so long as this does not cause undue hardship.

The *Eldridge* case referred to above concerned the right of deaf persons to signing interpreters in the provision of medical services. Though that case involved health services, its conclusions will likely be applied to educational services as well. In *Eldridge*, the Supreme Court of Canada found the government of British Columbia had a duty to provide signing interpreters for hearing impaired persons when providing medical services.[4] La Forest J. stated, "This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner....In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons."[5]

La Forest J. said the view that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits "bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence."[6] La Forest J. also commented, "The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit

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4 Prior to this decision, in 1993, the British Columbia Council of Human Rights found the University of British Columbia discriminated against a deaf student in that it failed to accommodate his disability by providing him with a signing interpreter in class. See *Howard v. University of British Columbia*, 18 C.H.R.R. D/353.

5 *Eldridge*, para. 73.

6 *Ibid.*, paras, 72-73.

equally from services offered to the general public is widely accepted in the human rights field."7

The *Eldridge* case is important because of its detailed analysis of the equality rights of persons with disabilities, and because it addresses the issues of undue hardship and "ancillary services." Among other things, the case held that:

- Signing interpreters made effective communication possible and were therefore an integral part of the provision of medical services, not an "ancillary service" that should not be publicly funded. 8
- The appellants were not asking for discrete services or products, such as hearing aids, that would help alleviate their general disadvantage. "On the contrary, they ask only for equal access to services that are available to all." 9
- The B.C. government failed to show that $150,000—the estimated cost of providing sign language interpretation for the whole of British Columbia and approximately 0.0025 percent of the provincial health care budget at the time—was an undue hardship.10

The *Eldridge* case indicates educators may have an obligation to provide a wide range of services that will enable students with disabilities to obtain equal benefit from the educational system.

(C) Integration of Students with Disabilities

In *Eaton*, the Supreme Court of Canada considered whether the placement of a child in a special education class was a violation of her equality rights under section 15(1) of the *Charter*. At the time of the hearing, Emily Eaton was a 12-year-old girl with cerebral palsy who could not speak or use sign language meaningfully and had no established alternative communication system. She had some visual impairment and used a walker. Emily Eaton spent three years in an integrated classroom with the support of a full-time educational assistant. At that point, the school board's "Identification, Placement and Review Committee" (IRPC) decided she should be placed in a special education class. The committee believed Emily was not benefiting from the integrated placement but in fact was being harmed by it, and placed her in the special education class over her parents' objections.

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7 *Ibid.*, para. 78.
8 *Ibid.*, paras. 67-71.

9 *Ibid.*, para. 92.
10 *Ibid.*, paras. 87 and 94.

The committee's decision was upheld by two appeal bodies within the educational system. The internal review process culminated in a 21-day hearing before the Ontario Special Education Tribunal that heard from many expert witnesses. The Tribunal found it was not possible to meet Emily's intellectual and academic needs in the regular classroom without "isolating her in a disserving and potentially invidious way." It expressed doubt that her emotional and social needs were being met in the regular classroom, and found "it would not be reasonably possible to accommodate Emily's particular safety needs [because of her habit of placing small objects in her mouth] without radically altering the classroom or establishing a very isolating level of adult supervision."11 Emily's parents appealed this decision to the court system.

The Supreme Court of Canada held that Emily Eaton's placement in a special education class was not, on the evidence, discriminatory. Sopinka J. pointed out that, for an action to constitute illegal discrimination, it must not only involve differential treatment but must also have negative consequences for the individual concerned. He stated, "I conclude that the placement of Emily which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the witholding of a benefit or advantage from the child."12

Part of Sopinka J.'s analysis was devoted to a consideration of the best interests of the child. He stated:

> A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting.13

Sopinka J. also reached the following conclusions:

- The protection of people with disabilities from discrimination requires not only protection from discrimination based on untrue stereotypes, but also reasonable accommodation of actual characteristics and needs. Sopinka J. stated: "The blind person cannot see and the person in a wheelchair needs a ramp....It is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from

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11 *Eaton v. Brant County Board of Education* (February 6, 1997), para. 70.
12 *Eaton*, para. 77.
13 *Eaton*, para. 74.

participation, which results in discrimination against them."14

- Segregation of students in special education classes can be either protective or violative of equality, depending upon the circumstances of the case. According to Sopinka J., "While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality."15

Eaton suggests that a "reasonable accommodation" analysis will be somewhat different in the educational context than in the employment context. While employment cases tend to focus on cost and inconvenience to employer and co-workers, education cases must also take into account the best interests of students. The placement of Emily Eaton in a special education class was held not to be discriminatory because it did not have negative consequences for her. Put another way, the form of accommodation sought by the parents (integration in a regular class) was found incapable of meeting Emily Eaton's needs.

The *Eaton* case also involved a particular set of facts that may not be typical. For this reason, it is difficult to predict how the case will be applied in future. Emily Eaton spent three years in an integrated setting with the support of a full-time assistant, but apparently did not benefit from this placement. On the contrary, the evidence suggested the placement may actually have been harmful to her. As well, the decision to place her in a special education class was reviewed twice within the educational system, including at a lengthy hearing that heard expert evidence.

In cases where accommodation in an integrated setting can meet the educational needs of students with disabilities, however, the "reasonable accommodation" analysis developed by the Supreme Court of Canada in *Eldridge* is likely to apply. This could require education providers either to accommodate students with disabilities in an integrated setting or to show that it would be an undue hardship to do so.

The *Eaton* case is a reminder that the duty of reasonable accommodation will only arise when a student with a disability experiences negative consequences because of differential treatment. Some families of students with disabilities have complained to the Commission that placement in a special education class can have a range of negative consequences including isolation from the mainstream, separation from friends, and geographical distance from a neighbourhood school.

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14 *Eaton*, para. 64.

15 *Eaton*, para. 66.

Yude M. Henteloff, Q.C., in a presentation to the Canadian Association of Statutory Human Rights Agencies in June 1997, summarized *Eaton* as standing for the following principles.

1. Integration of children with disabilities is the norm because of the benefits it generally provides. However, each situation must be decided on an individual basis.

2. Failure to accommodate the needs of children with disabilities constitutes discrimination under section 15 of the *Charter*.

3. Schools must provide all reasonable accommodations to children with disabilities in the regular classroom.

4. A child should only be segregated if she or he cannot be reasonably accommodated in a regular class. The question of what is reasonable should be determined according to established human rights principles which define reasonable accommodation as being to the point of undue hardship, with the onus on the school to show that segregation is necessary. The Supreme Court in *Eaton* was silent on the extent to which financial factors are relevant in determining reasonable accommodations. However, in other cases, the Supreme Court has cautioned against accepting financial considerations alone as justifying a *Charter* violation. The same caution should be exercised in education cases.

5. Ultimately, the deciding factor will be the child's best interests, rather than parental choice. However, parents are entitled to insist that schools reasonably accommodate their children to enable their integration into regular classes, and to argue that the best interests of their children require that all reasonable accommodations (up to the point of undue hardship) be provided.[16]

7. Conclusion

The subject addressed by the Review Committee is an ongoing concern for the Commission because it receives regular complaints from students and parents alleging disability discrimination in the education system.

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16 Yude M. Henteloff, Q.C., "How Best to Secure the Right to an Appropriate Education for Special Needs Children—the Charter or Human Rights Code?," presented to the Canadian Association of Statutory Human Rights Agencies (CASHRA), Toronto, Ontario, June 3, 1997, pp. 29-30.

If educators are to avoid discrimination and provide equality of educational benefit to students with disabilities, they must be familiar with the principles of human rights law. Educators must also ensure that their understanding of the rights of students with disabilities—an evolving area of law—remains updated. The Commission would be happy to consult with the Committee or with Saskatchewan Education on an ongoing basis, if this would be considered helpful.

The Commission is pleased to note recent steps within the educational system to establish an appeal process for reviewing the placement of students with disabilities. An independent and knowledgeable review body—one with expertise in human rights issues—could provide valuable support to the process of developing equity for students with disabilities. Such a review process might also help resolve cases, making it unnecessary for some people to file complaints with the Human Rights Commission.

Finally, the Commission would like to express appreciation for the work of the Special Education Review Committee and to thank it for this opportunity to present the Commission's views. We look forward with interest to the Committee's report.

APPENDIX A
Definition of Disability under The Saskatchewan Human Rights Code

Section (d.1) **"disability"** means:

(i) any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes:

(A) epilepsy;
(B) any degree of paralysis;
(C) amputation;
(D) lack of physical co-ordination;
(E) blindness or visual impediment;
(F) deafness or hearing impediment;
(G) muteness or speech impediment; or
(H) physical reliance on a service animal, wheelchair or other remedial appliance or device; or

(ii) any of:

(A) a condition of mental retardation or impairment;
(B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or
(C) a mental disorder.